BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit may be found in the record at page 25.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED.

The question presented is stated in the petition, and it may be briefly restated here as follows:

Can a taxpayer sustain a loss from the sale of an asset which the Court found to be worthless prior to the date of the sale?

STATEMENT.

The facts and reasons relied on for the issuance of the writ and the statement of the case appear in the petition.

ARGUMENT.

The facts in the case were stipulated and both the Board of Tax Appeals and the United States Circuit Court of Appeals for the Eighth Circuit found the facts to be in accordance with the stipulation entered into by the parties hereto.

The court below found as a fact that at the time the mortgage note became due petitioner's interest in the property was of no value. The Court made the finding in paragraph 3 of its opinion in the following language:

> "At that time (January 27, 1935) business conditions had so completely changed in that particular locality that taxpayer's equity in said property was of no value."

This finding of fact fixes petitioner's loss as of that date and attributes that loss to a change in business conditions. After that date no gain or loss could be recognized from an attempted sale of the capital asset, because that asset was worthless and could not be sold.

The mortgage foreclosure sale which took place on March 16, 1935, was of no tax significance so far as the rights of this taxpayer (petitioner herein) are concerned. The loss had occurred, according to the finding of the Court, on January 27, 1935, and petitioner could not sustain any loss from the mortgage foreclosure sale.

The court below erroneously held that petitioner's loss was a capital loss and resulted from the foreclosure sale. This ruling of the United States Circuit Court of Appeals for the Eighth Circuit is not only erroneous, but is in direct conflict with decisions in other circuits in the following cases:

> Commissioner v. Freihofer, 102 F. (2d) 787 (C. C. A. 3);

Commissioner v. Hoffman, 117 F. (2d) 987 (C. C. A. 2);
Schmidlapp v. Commissioner, 96 F. (2d) 680 (C. C. A. 2);
Commissioner v. Coggan, 119 F. (2d) 504 (C. C. A. 1).

In the case of Commissioner v. Freihofer, 102 F. (2d) 787 (C. C. A. 3), the facts are identical with those in this case. In the Freihofer case the taxpayers had purchased real estate which was subject to a mortgage exactly as was done in this case. The Court found at the time of the mortgage foreclosure sale that the taxpayers' equity had become worthless, just as the Court found in this case. In the opinion the Court of Appeals for the Third Circuit said:

> "The taxpayers' losses resulted from the fact that their equities had become worthless and not from the sale of those equities. One cannot sell what has wholly disappeared. Consequently the foreclosure sales had no reality as sales so far as the taxpayers' equities of redemption were concerned. * * *
>
> "It follows that while the foreclosure sales were undoubtedly the identifiable events which pointed out the worthlessness of the taxpayers' equities, they did not cause the losses, and consequently the provisions of Sec. 117 do not apply."

In the case at bar the foreclosure sale was not the identifiable event which pointed out the worthlessness of petitioner's equity. This was not necessary, because it was stipulated by and between the parties hereto that petitioner's equity was of no value as of January 27, 1935, while the mortgage foreclosure sale did not take place until March 16, 1935. Both the petitioner and the respondent agreed and stipulated that prior to the foreclosure sale petitioner's equity was worthless. The Court found the facts to be in accordance with such agreement and stipula-

tion, and consequently no loss could be sustained by petitioner by the mortgage foreclosure sale, which took place at a later date.

In the case of Commissioner v. Coggan, 119 Fed. (2d) 504 (C. C. A. 1), the Court of Appeals for the First Circuit said:

> "The taxpayer now urges that the stock had become worthless prior to the sale at public auction. Under the 1934 Act securities which had become utterly worthless could be charged off as an ordinary loss during the year in which they became worthless."

Now, in the case at bar, the real estate which had become worthless prior to the mortgage foreclosure sale could be charged off as an ordinary loss and the taxpayer did not suffer a further loss by reason of the mortgage foreclosure sale.

In the case of Commissioner v. Hoffman, 117 F. (2d) 987 (C. C. A. 2), the Court of Appeals for the Second Circuit said:

> "The Commissioner seeks reversal of a decision of the Board holding that under Section 23 (e) (2) of the Revenue Act of 1934 the taxpayers were entitled to deduct from gross income a loss sustained in 1934 when the interest in improved real estate owned by them subject to a mortgage, upon which they had not assumed liability, became worthless and they abandoned their interest and so advised the mortgagee; although title remained in them until completion of foreclosure proceedings in the following year. Upon amply sufficient evidence the Board found specifically that the taxpayers' interest in the property became worthless in 1934. We see no valid ground to differentiate between a loss suffered on real estate and one on personalty, if worthlessness is definitely established."

In view of the fact that the decision of the United States

Circuit Court of Appeals for the Eighth Circuit in this case is directly in conflict with decisions of the United States Circuit Court of Appeals for the Third Circuit, the United States Circuit Court of Appeals for the First Circuit and the United States Circuit Court of Appeals for the Second Circuit, we respectfully submit that this petition should be granted.

LON O. HOCKER,
EDWARD W. LAKE,
CHASE MORSEY,
407 North Eighth Street,
St. Louis, Missouri,
Attorneys for Petitioner.